90-251

NO.

IN THE
Supreme Court of the United States

October Term, 1990

ROBERTO FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether the trial court committed reversible error by instructing the jury that it would be improper for the prosecutor to respond to defense counsel's challenge to resolve on rebuttal summation the inconsistencies in testimony of the two major prosecution witnesses.

Whether the trial court had improperly allowed to be placed before the jury hearsay testimony regarding statements of the government's own witness when that witness in his sworn testimony had denied making the statements.

Whether the trial court improperly permitted the prosecutor to elicit testimony regarding petitioners post arrest silence.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were petitioner, Roberto Figueroa, two co-defendants at trial, Hector Rivera and Rigoberto Ramos, and the United States of America.

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OPINIONS BELOW

A judgment of conviction was entered against petitioner, Roberto Figueroa, after jury trial in the United States District Court for the Southern District of New York on September 19, 1989.

Petitioner appealed that judgment and, in an opinion rendered May 7, 1990, the United States Court of Appeals for the Second Circuit affirmed the convictions of petitioner and his co-defendants. That opinion was rendered by means of an unreported summary order and a copy is annexed hereto at page 1a in Appendix A. A petition for rehearing was not filed herein.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rule 20 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution.
The Sixth Amendment to the United States Constitution.
Title 21, United States Code, Section 841.
Title 21, United States Code, Section 846.
The pertinent text of the foregoing provisions are set forth in Appendix B at page 5a

PRELIMINARY STATEMENT

Petitioner, Roberto Figueroa, was found guilty on May 30, 1989 after a jury trial on charges of conspiracy to violate the federal narcotics laws (Count One) and possession with intent to distribute narcotics (Counts Two and Three) in violation of Title 21, United States Code, Sections 841(a)(1) and 846. On September 19, 1989, a judgment of conviction was entered in petitioner's case in the United States District Court for the Southern District of New York sentencing petitioner, under the Sentencing Reform Act, to a term of imprisonment of twenty-four (24) years on each of Counts I, II and III. The term imposed on each count to run concurrently with one another. The mandatory special assessments were imposed as to each Count, and a fine of Twenty Thousand ($20,000.00) Dollars was imposed as to Count III. A consecutive term of ten (10) years supervised release on each count was imposed. The term of supervised release on each count to run concurrently with one another.

Petitioner timely filed an appeal to the United States Court of Appeals for the Second Circuit which after argument resulted in a summary order on May 7, 1990 affirming the conviction entered in the United States District Court for the Southern District of New York.

Petitioner Roberto Figueroa is currently incarcerated. Co-defendant Hector Rivera was convicted upon the same counts. Co-defendant Rigoberto Ramos was convicted on Counts One and Two of the indictment.

STATEMENT OF THE CASE

In September of 1988 the Drug Enforcement Administration (hereinafter DEA) arranged through an informant, Sergio Quijada-Rey, to meet with a source for drugs, one Victor Ventura. The DEA chose not to use an agent for the undercover meeting, but rather had Quijada-Rey introduce Ventura to a paid DEA informant, Miguel Teixeira (463-464).[1]

Teixeira testified during the trial that he was a Portuguese citizen, who after graduating from high school had served in the Portuguese Army in North Africa. He came to the United States in 1980 and after serving as a butler and working in restaurants, he began to work as an informant. At the time of his testimony he had been working as a full-time paid informant for the DEA for about two years (175-177) (The word "informant" might seem to be a misnomer here, since it appears the DEA would give Teixeira information and then he would go out and develop the case for them).

On September 8, 1988, Quijada-Rey and Teixeira met with Victor Ventura (also known as Rudy) at the Buccaneer diner in Queens. Quijada-Rey introduced Teixeira to Ventura. Ventura furnished two samples of heroin to Teixeira, stating "Here's two samples. I believe one is better than the other one. You check it out and get back to me." (179-182, 464-466, Government's Exhibit 25).

Teixeira and Ventura next met on September 21, 1988 at the Cantina Restaurant at 70th and Columbus in Manhattan, after Ventura had made beeper contact with Teixeira (182-184). The meeting was attended by Teixeira, Quijada-Rey, Ventura and Ventura's brother-in-law, Juan Silvestro (183-184, 466, 561-563). Teixeira told Ventura that he liked the drug samples and wanted two kilograms of heroin and five kilograms of cocaine. Ventura told Teixeira that his "Chinese connection might still be in Canada" (260). Juan Silvestro, Ventura's brother-in-law, joined in the conversation and stated that "the Chinese

1. Numerical references are to the trial transcript unless otherwise noted.

connection was good and never gave them (Silvestro and Ventura) any problems." (261) Silvestro further stated that if Teixeira helped him (Silvestro) and Ventura they would help Teixeira (261, 566-568). Petitioner Robert Figueroa was not named during the conversation nor was he present in any manner (563). Thereafter, Teixeira took Ventura out to view a $100,000 "flash roll" (186-187). After the meeting had concluded Ventura, Silvestro and Quijada-Rey were followed to the vicinity of a gas station, C & J Auto and a restaurant "Mexico Next to Texaco" (470).

Teixeira testified that approximately one to two weeks later he was beeped again by Ventura and as a result again met Ventura at the Cantina Restaurant in uptown Manhattan (189) (Agent Nargi gave inconsistent testimony in that he claimed the next meeting, which had occurred on October 3, 1988, was at the "Mexico Next to Texaco" restaurant in lower Manhattan next to the C & J Auto station (274, 470-476). Teixeira claimed he met with Ventura, Quijada-Rey and another individual introduced as Ventura's cousin, Pedro Taveras (189-190, 268-279, 580). Teixeira claimed that Ventura said he was well-connected with people who own a gas station and who were connected with Chinese people (190).

Teixeira next met with Ventura, Quijada-Rey and Taveras at Christopher Street. All four traveled to the "Mexico Next to Texaco" restaurant where Ventura left to talk to someone in the gas station. Teixeira stated that thereafter co-petitioner Hector Rivera walked into the restaurant, summoned Ventura and spoke with him. Ventura said Rivera was one of his "connections" (192-197).

Ventura indicated to Teixeira that he had the cocaine and was going for the heroin. Ventura instructed Teixeira that when the drugs were together they would meet at Ventura's apartment in Queens. Teixeira then left to await Ventura's beep and delivery of the drugs (197-199, 277-280).

Later that evening Ventura beeped Teixeira and told him that "we're ready, come over we have them" (200). When Teixeira delayed, Taveras, Ventura's cousin, beeped a second time

to press Teixeira to come to receive delivery of the drugs (199-200). Sometime later Teixeira was beeped by Hector, who Teixeira claims had the drugs and who complained about the failure to take delivery (201-204). Teixeira refused to go forward with the delivery claiming that his truck had already left for Canada (203-205, 280-283). (Debriefing reports by agents appear to contradict in part Teixeira's recount of the events connected with the Queens non-delivery (583-584)).

Surveillance agents testified that on November 3, 1988 another meeting with Ventura and Teixeira occurred at the Catina Restaurant in uptown Manhattan. Teixeira, Quijada-Rey and Ventura met while Pedro Taveras waited in a car outside (475-476). However, Teixeira did not recall that there had been a meeting between the attempt to deliver in Queens and the day of the arrests on November 8, 1988 (205). The agents testified that subsequently they observed Ventura meet with petitioner Robert Figueroa in the gas station, although none of the conversation was heard by the agents (476-477) and Ventura never testified that such a meeting occurred (66). The agent debriefing Teixeira on November 3, 1988, was told that Teixeira insisted that the deal be done in the open, not at an apartment (586).

On the day of November 8, 1988, Ventura, Quijada-Rey, Taveras and Teixeira met at the "Mexico Next to Texaco" restaurant (206-207). Although the meeting occurred next to his gas station, petitioner Robert Figueroa was not a participant at this meeting (590-591). Ventura advised Teixeira that the drugs were ready. Ventura instructed Teixeira to park his car at the gasoline pumps to purchase gasoline. At the gasoline pumps Ventura dispensed five dollars worth of gasoline. Petitioner Robert Figueroa was standing nearby and Teixeira claimed petitioner Figueroa had said "hi.' (207-209) Teixeira then was asked by Ventura if he had the money and was gold that Teixeira wanted to see the drugs first. Teixeira stated that Ventura then turned to petitioner Figueroa and said "he wants to see, he wants to see. I'm going to show him." (206-209) Teixeira

responded that he would go for the money and then left. (209-210)

When Teixeira returned he saw petitioner Robert Figueroa in the door of the gas station. Teixeira claimed Mr. Figueroa summoned him into the gas station where he showed Teixeira a bag of heroin, telling Teixeira the rest was present as well (210-212). Teixeira told Rudy to bring the bag to the car. At the car a signal was given and Ventura was arrested along with the personnel of and visitors to the gas station. So many persons were arrested that they ran out of handcuffs, although most of those arrested were not prosecuted. (212-213, 301-309, 597-598)

After the arrests Teixeira remained in the station. Teixeira answered he gas station telephone, and a caller purportedly asked in English for "Cessi Figueroa" and then asked for Hector Rivera (213-215, 237-238). The caller identified himself as El Chino and asked if Cessi left anything. Teixeira claims to have responded that "200,000" had been left. The caller stated he would be right over. (238-239)

Approximately 15 to 20 minutes later Defendant Tony Wong arrived and asked Teixeira, "you got my money" and Teixeira said "yes". Wong inquired as to why Cessi and Hector's cars were present and then moments later he too was arrested. (239-240)

Victor Ventura, after his arrest entered into a plea agreement. At trial he testified he had known petitioner Figueroa for six or seven months. Ventura described his background as a drug addict and his prior narcotic transactions which he claimed were on behalf of Hector Rivera and Robert Figueroa. He claimed that their source of narcotics was a person known as El Chino who he identified as defendant Wong (42-59). Ventura also set forth his very disparate versions of his participation in meetings with Teixeira and the events of the day of his arrest. (59-68)

In addition to the informants, the government also called DEA agents, Nicolas Nargi, Michael Defrancisci, Robert Buskey, Anthony Belovich, Richard Piccininni, John Tully and Russel Benson, who testified regarding their surveillance activities and their actions regarding the seizures of various items of physical evidence, additional heroin, four kilograms of cocaine in a nearby car and the arrests of the defendants.

Also testifying on behalf of the government was an FBI special agent who testified concerning an inconclusive fingerprint analysis he conducted.

Mr. John Stevenson, an employee of NYNEX Mobile Communications, testified concerning the interpretation of Mobile Telephone bills which related to two portable phones which were seized in this case.

In the defense case, petitioner Figueroa introduced two stipulations, which it was argued indicated that Ventura and Teixeira had made inconsistent statements to the prosecutor. (978). The centrla focus of the defense case had been developed during cross-examination. Petitioner's position was that without the testimony of informants Ventura and Teixeira there was no case as to Robert Figueroa, and that the testimony of both informants were inconsistent with each other and not worthy of belief. Ventura during his testimony repeatedly contradicted Teixeira's testimony. Ventura denied giving samples to Teixeira (172); denied the participation of his cousin, Pedro Taveras[2] and his brother-in-law Juan Sylvestri in the drug deals, all contrary to the testimony Teixeira (81-85, 121); denied saying to Teixeira, contrary to the testimony, that he had a Chinese connection (83-84, 109); and denied telling Teixeira that he (Ventura) had done a $800,000 drug deal with money fronted by his brother-in-law's. In essence, Ventura contradicted large and critical sections of Teixeira's testimony. Moreover the evidence showed that Ventura's mother and brothers had been arrested for drugs (129), suggesting that he would be concealing the in-

2. Taveras had jumped bail before trial (122).

volvement of family members and had a motive to point at others.

Teixeira's credibility was also called heavily into issue. Although Teixeira had not furnished the information that led to the case, he was used in place of an agent and paid $10,000 for his activities in the instant case. (241) In the past year and one-half Teixeira had been paid approximately $82,000 by the DEA, including the $11,500 payment just prior to trial. As the Court observed,

> The Court: $11,500 a month is $138,000 a year. That's more than the Chief Justice of the United States gets, that's nice money. (305)

Most importantly, virtually every early reference to petitioner Figueroa made by Teixeira trial in his testimony was not corroborated by debriefings at the time of the events and often he clearly tried to mislead the jury (421-427). Teixeira and the agents had not attempted to corroborate critical conversations by use of a body wire or telephone hook-up at any time during the investigation (294-296).

REASONS FOR GRANTING THE WRIT

I.

A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THE QUESTION OF WHETHER THE TRIAL COURT'S INSTRUCTION DIRECTLY RELATING TO DEFENSE COUNSEL'S COMMENTS ON SUMMATION HAD DEPRIVED PETITIONER OF A FAIR TRIAL

In its summary order the United States Court of Appeals for the Second Circuit found the trial court's instruction to the jury did not have the effect of criticizing defense counsel nor did it prevent the jury from fully considering counsel's arguments regarding the inconsistencies or credibility gaps in the government's case.

Petitioner submits however, that defense counsel's challenge to the prosecution, to state in his rebuttal whether the plea agreement would be abrogated in light of the apparent lies of the government's cooperating witness and whether the major

inconsistencies between the informant's testimony and the cooperating witnesses testimony would be resolved against the cooperating witness, was entirely proper. The trial court's instruction, made at the government's request, essentially that it would be improper to answer counsel's challenge, permitted the prosecutor to sidestep the credibility issue and undercut the effectiveness of trial counsel's summation.

The United States Court of Appeals for the Second Circuit relied upon its opinion in *United States v. Modica,* 663 F.2d 1173, 1179 (2d Cir. 1981), and the admonition to prosecutors "not to vouch for their witnesses' truthfulness." It is asserted however, that defense counsel's challenge was made in response to the very type of prosecutorial argument, specifically proscribed in *Modica, supra,* and was an appropriate challenge in light of the government's opening summation.

The prosecutor on summation had in fact, told the jury his opinion of Ventura and his belief that Ventura's testimony was credible. He told the jury that he thought they would find Mr. Ventura to be "basically what he said to you he was." (1032) He told the jury he thought Ventura didn't have the cunning or the mental ability to pull a fast one on them (1032). He told the jury that Ventura's terrible memory was the effect of his history of drug abuse and that therefore he wasn't alert enough, or capable enough to run this type of operation. He told the jury to believe that Ventura was a go-for whose role was to insulate others involved in the transaction (1032). He told the jury that Ventura was a victim, a prisoner of narcotics abuse (1033). The prosecutor told the jury that Ventura could have testified not to save himself, but maybe to keep the same thing from happening to the children he spoke about (1034). The prosecutor told the jury that Ventura was somehow honorable. The prosecutor offered his arguments as to why this witness should be believed, his reasons why the testimony should be seen as credible. The prosecutor attempted to bolster the credibility of a witness who was caugbht in lies, of a witness who couldn't recall things that were damaging to him and others he had chosen to protect. The prosecutor told the jury why Ventura had decided to testify. That because of this he should be believed. That he simply had a poor memory due to his use of drugs (1034). The jury, he was

arguing, should feel sorry for this witness and should therefore trust this witness.

The prosecutor in this case, in strikingly similarity to the behavior criticized in *Modica, supra,* had not only given his opinion that Ventura was "what he said to you he was", and that he thought he was basically incapable of lying to them (1032), but "apparently in order to explain" his inconsistency with the testimony of other witnesses had characterized the witness as a rehabilitated drug abuser. The statement seemed to have been designed to explain away testimonial inadequacies and cast the witness as somehow honorable and therefore worthy of belief. *Modica, supra* at 1179-81. Further, the prosecutor punctuated his summation with excessive use of the pronoun "I", as in "I think" and "I suggest to you" specifically with reference to Ventura's testimony concluding with

> "But I suggest to you that when you think about the testimony that he gave, you should conclude . . . (Ventura) was trying to do his best to tell you what actually happened. (1034-5).

This type of summation creates an impression that the prosecution is relying upon additional evidence not before the jury and runs the risk that the jury may think the issue is whether the prosecutor is truthful and not whether the testimony is truthful. *Modica, supra,* 1178-82.

On the heels of his own summation, the prosecutor objected to defense counsel's summation. The attorney for the government said it was improper to ask him to state whether he believed Ventura. Counsel for Robert Figueroa did not challenge the prosecution to state whether he believed Ventura. Specifically, the challenge related to two specific facts in Ventura's testimony, i.e., did Ventura lie about Silvestri and Taveras. The challenge was not whether the prosecutor thought him credible. The challenge was one of fact. Did Ventura lie when he said Taveras was innocent? Did Ventura lie when he said Silvestri wasn't involved? The testimony of Agent Nargi and Teixeira would indicate that he lied. Teixeira's reports to the agents who supervised him would indicate that Ventura lied. All indications are that Ventura lied about these two men. The

prosecutor was challenged to acknowledge these lies.

Trial counsel's argument was clearly proper. The proof had shown Ventura to have lied about Silvestri's role on September 21, 1988, and to have lied about Traveras role in the transaction. Ventura was one of the key witnesses in a weak prosecution case. Argument of the unfavorable inference to be drawn from these lies was clearly proper. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 174 (1974). To ask the prosecutor to state a position on whether these were in fact lies, contrary to the testimony of the case agents and other informant, was clearly proper, especially where a plea agreement was based on the veracity of the witness.

Appellant's counsel made proper argument. It cannot serve as justification for an improper response by government counsel. *United States v. Latimer,* 511 F.2d 498, 502-3 (10th Cir. 1975); *United States v. Ludwig,* 508 F.2d 140 (10th Cir. 1974).

Defense counsel's challenge was wholly proper. The argument clearly did not go to matters outside the record. The statements related to testimony on the record. If Ventura was telling the truth with regard to his cousin and his brother-in-law, Teixeira was lying to agents from the start in his reports. See generally, *United States v. Peak,* 498 F.2d. 1337 (6th Cir. 1974).

Further, the challenge did not put the prosecutors personal belief or opinion of the truthfulness of the witness in issue, but questioned whether the witness had *in fact* lied on two key points. The trial court's instruction detracted from the impact of counsel's summation, and undercut the unfavorable inference which should have properly been drawn from the testimony.

The District Court erred by improperly limiting the effectiveness of trial counsel's closing argument in this manner. Defense counsel's summation and the unfavorable inferences drawn were proper standing alone, moreover, the summation constituted a reasonable response to the prosecutor's opinions as to why Ventura should be believed and his attempt to explain and excuse Ventura's poor memory (1032-4). *United States v. Wilkinson,* 754 F.2d 1427, 1435 (2d Cir. 1985). The trial court's

instruction was incorrect in the context of this case and warranted reversal of the conviction.

During summation, the prosecutor attempted to explain the clear inconsistencies and apparent lies of his cooperating witness, Ventura, by suggesting, without foundation, that it was the result of Ventura's prior drug addiction. In response, counsel challenged the prosecutor to state in his rebuttal whether Ventura's plea agreement would be abrogated in light of these apparent lies and whether the major inconsistencies between Teixeira's testimony and Ventura's testimony would be resolved against Ventura. Instead of responding, the prosecutor sought and received an instruction from the court to the jury that it would be improper for the prosecutor to answer counsel's challenge, permitting the prosecutor to sidestep the issue and undercutting counsel's credibility with the jury. It is submitted that the court's erroneous instruction deprived Robert Figueroa of a fair trial and mandated reversal.

Counsel for petitioner, Robert Figueroa in summation argued that the evidence presented by the government, the testimony of the government's witnesses, was utterly without foundation and lacking in corroboration (1050). Defense counsel pointed out to the jury that there were no tape recordings made, and no undercover agents participating in the transaction which would have corroborated the testimony of the government's witnesses (1050). The government's chief witnesses at trial were Teixeira, a paid informant, and Ventura, a participant in the transaction who testified pursuant to a plea agreement.

Counsel for petitioner, Robert Figueroa detailed various lies and inconsistencies in the testimony of the government's witnesses. During its opening summation, the prosecutor argued over objection that Ventura and Teixeira were "trying to give the best testimony they can—." (1039) Defense counsel called upon the jury to challenge the prosecutor in his rebuttal summation to answer whether Ventura, the cooperating witness, had lied when he told the court that his cousin and his brother-in-law were not involved in the offense, contrary to the testimony of Teixeira. The Government had presented these two witnesses. The obvious inconsistencies required response.

The next day, the trial court at the request of the prosecution, improperly instructed the jury that defense counsel's request was improper, that it was improper for a lawyer to give his opinion or belief, or to tell you what he thinks as to whether a witness is truthful. This instruction both misstated defense counsel's challenge, and was an improper limitation and criticism of trial counsel's argument on summation.

Counsel for petitioner, Robert Figueroa, had indicated in summation that Ventura testified falsely and contrary to the evidence at trial, regarding the role played by Juan Silvestri at the September 21, 1988 meeting (1051). Ventura testified that Silvestri did not talk about narcotics at that meeting (85). The evidence at trial indicated that Silvestri had played a major part in the conversation at that meeting, but Ventura denied that Silvestri spoke "about business" (85), specifically denying that Silvestri spoke about their "Chinese connection" on September 21, 1988. (83-84) Ventura and Silvestri met with the informant on September 21, 1988. Agent Nargi testified that after meeting with Ventura and Silvestri, the informant (Teixeira) informed him that Silvestri was a participant in the conversation and spoke specifically about the Chinese connection (567). Silvestri further stated that if Teixeira helped them, they would help him (567).

Ventura clearly had a reason to testify falsely regarding Silvestri, Ventura had a reason to protect Silvestri. Juan Silvestri is Ventura's brother-in-law (1051, 1054).

Similarly, defense counsel argued that Ventura testified falsely about Pedro Taveras, Ventura's cousin, and the role Taveras played on October 3, 1988 and November 8, 1988. Ventura testified that Taveras was innocent of any wrongdoing, (121) yet Teixeira made clear that Taveras had pressed him to participate in the drug deal (200). Ventura had a reason to testify falsely regarding Taveras and protect Taveras who was his cousin (1052, 1054).

In his first summation, the prosecutor indicated in his summation that Ventura merely made some mistakes in his testimony (1028-1032). Counsel for petitioner Figueroa asked that the government be held to its burden of proof.

***

> The prosecutor stood up here and said he made some mistakes. He didn't make mistakes. He lied. What was Juan Silvestri doing there. He lied.
>
> Ask the prosecutor if he thinks Rudy Ventura lied when he said Silvestri had nothing to do with it. When he gets on his rebuttal, the first thing, let him say whether, write it down, let him say whether Pedro Taveras was involved, let him say whether he says Rudy Ventura lied about that. (1067) (1068)
>
> ****
>
> Because when he stood up here and he argued to you just before he didn't say he lied. He said he was confused. He said he was confused. He said he didn't remember. He said he was drug fogged, there was no proof of any of that.

The attorney for the government objected. The trial court overruled the objection indicating that counsel's statements were argument and appropriate summation (1068).

At the conclusion of the summation by counsel for Robert Figueroa, however, the prosecutor asked the court for a jury instruction that it was improper for defense counsel to challenge the prosecution to state whether Ventura lied on these points (1089). The trial court agreed.

The next morning, prior to the summations of co-counsel the court instructed, over counsel's objection, as follows:

> Two other things. In argument yesterday afternoon or early morning, Mr. Schulman suggested to you that you should ask Mr. Klotz if he thought that a certain witness lied. And I want to charge you that it is improper for any lawyer during their summation, whether it be a defense lawyer or an attorney for the government, to give his opinion or belief or to tell you what he thinks as to whether a witness is truthful or whether the witness is lying. A lawyer may argue to you that you should believe or disbelieve a witness. But no lawyer is permitted to explain or express his opinion about any witness' veracity. You're the ones who determine whether a witness is truthful and credible, not the lawyers. If the lawyers did it, we wouldn't need

> juries. That's why you're here, to decide whether a witness is truthful (1098-9).

The trial court left the jury with the impression that defense counsel's summation on behalf of Mr. Figueroa was somehow improper and permitted the prosecution to wiggle out of an impossible trap.

It is submitted that the prosecutor took an improper course here, because of tremendous inconsistencies and weaknesses in his case. The prosecutor desparately needed Ventura in order to place petitioner in the alleged conspiracy, but his testimony was repeatedly inconsistent with the evidence. Ventura's testimony was far from credible. On summation the prosecutor repeatedly attempted to bolster this witness and explain away inconsistencies. Defense counsel challenge was wholly proper. The government had presented two inconsistent versions, one which the informant had given to agents as they occurred and one which Ventura presented once he had been caught. Defense counsel challenged the government to acknowledge whether Ventura's version of the facts was a lie in two specific instances. The government's clever maneuver permitted the prosecutor to side step the issue and present two inconsistent stories as the truth. The trial court's instruction denied petitioner a fair trial.

II

A WRIT OF CETIORARI SHOULD ISSUE TO RESOLVE THE QUESTION OF WHETHER THE INTRODUCTION OF A WITNESSES' STATEMENTS, IN HEARSAY FORM, DESPITE DENIALS BY THE GOVERNMENT'S OWN WITNESS THAT SUCH STATEMENTS WERE MADE, HAD DEPRIVED PETITIONER OF A FAIR TRIAL

The trial court improperly allowed to be placed before the jury hearsay testimony regarding statements of a government witness, Rudy Ventura, through the testimony of a government informant and an agent, despite the fact that Ventura, in sworn testimony, denied ever making such statements. This error was further compounded when the prosecution sought to place before the jury and was assisted by the court, in showing that

the agents had considered this investigation to be titled the "Figueroa" case and then hammered the points home in rebuttal summation. (1198-1199) It is submitted that this evidence was improperly introduced and merits reversal.

Counsel for appellant, Robert Figueroa during cross-examination of government witness Rudy Ventura placed the following questions and received the following answers:

> Q. Had you ever told Teixeria that you had done a deal once for $800,000?
> A. No, sir.
> Q. Did you ever say that your brother-in-laws had fornted you the money, the $800,000?
> A. No, sir.
> Q. Never said that to Mr. Teixeira at all, nothing like that in words or substance?
> A. No, sir.

The government chose not to pose any redirect to its witness concerning this area of inquiry. The government however, elicited, over trial counsel's objection, form its paid informant, Miguel Teixeira, hearsay testimony that Rudy Ventura had made such statements to him during the course of the investigation. (234) The government then bolstered this hearsay testimony by eliciting from DEA agent Nargi testimony that Miguel Teixeira had reported to him at the time of the occurrence that Rudy Ventura had make such statements to him and that he had further indicated that such $800,000 deal had been made in conjunction with Robert Figueroa. (634-641)[3]

It is clear that the testomony of Mr. Teixeira is hearsay and comes precisely within the definition as set forth in the Rederal Rules of Evidence Rule 802.

The United States Court of Appeals for the Second Circuit ruled that Texeira's testimony concerning Ventura's alleged statement's was admissible under Federal Rules of Evidence, Rule 801 (d) (2) (E). It is assertid that the statement is not admissible since not made "in furtherance of the conspiracy". A mere casual admission of past culpable conduct is not made in

3. The court, at first sustained trial counsel's objection (634) and then reversed itself (659).

furtherance of the conspiracy. *United States v. Moore*, 522 F.2d 1068 (9th Cir. 1975). The statement must not merely inform the listener of the declarant's activities, it must somehow advance the objectives of the conspiracy. Further, these statements were admitted against the defendant without independent evidence establishing petitioner's participation in the conspiracy. It is to be noted that Ventura had testified before either Texiera or Nargi and had denied these statements. The testimony of Agent Nargi is double hearsay in that he was permitted to testify to what Rudy Ventura had said even though the witness was not a party to such a conversation and Ventura was himself a witness at the trial.

This chain of hearsay was utilized by the government to subvert the petitioner's right to confront the witnesses against him. By so doing, the government produced testimony that Rudy Ventura had in the past done an $800,000 narcotics deal woth petitioner, Robert Figueroa, even though Rudy Ventura, who appeared as a government winess, denied such and event or statement.

Although counsel objected to the introduction of first portion of the hearsay chain the court permitted the statement to be placed before the jury for the truth of the statements contained therein. (234) The court did, after much colloquy (634-641), give a limiting instruction that as noted by counsel did not cure the impropriety (641-42).

It is submitted that the error herin is even more serious than those presented in *United States v. Check*, 582 F.2d 668 (2nd Cir. 1978) and *United States v. Figueroa*, 750 F.2d 232 (2d Cir. 1984) In those cases the hearsay statements were at least directly relevant to crime charged. In the instant case the hearsay interjected the additional problem of uncharged similar acts.

The introduction of uncharged crominal acts is governed by Rule 403 and 404 of the Federal Rules of Evidence. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Case law requires that questions of admisibility arising under Rule 403 be determined by a balancing test examining the probative value of the evidence against its prejucicial potential. See, for example, *United States v. Praetorius,* 462 F. Supp 924 (E.D.N.Y. 1978).

In determining whether to exclude evidence of prior criminal acts under Rule 403, the court must consider whether "the chain of inferences necessary to connect evidence with the ultimate fact to be proved [is] unduly long." *United States v. Peterson,* 808 F.2d 969, 974 (2d Cir. 1987), quoting *United States v. Lyles,* 593 F. 2d 182, 195-96 (2d Cir.), *cert. denied.* 440 U.S. 972 (1979). "The greater the danger of prejudice, the more justification must be shown for the introduction of challenged evidence." *United States v. Lyles,* 593 F.2d at 195 *supra.*

If a similar actr evidence is admitted, it must pass a balancing test.

Rule 404 controls the introduction of such evidence,

* * *

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

Evidence of other crimes or acts are generally inadmissible to show the character of the accused and that the accused acted in conformity of such trait. See *United States v. Carter,* 475 F.2d 349 (D.C. Cir. 1973) and *Lovely v. United States,* 169 F.2df 386 (4th Cir 1948. Such evidence may be admitted only if the probative value of the similar act outweighs its prejudicial effect. Even then, its probative value must relate to or show; motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake , or accident. *United States v. James,* 555 F.2d 992 (D.C. Cir. 1977) *United States v. Free,* 574 F. 2d 1221 (5th Cir. 1978) Under Rule 404, it is clear that the evidence in question doesn not address any of the nine factors set

forth in the rule. Similarly, it cannot be said that the probative value of the offered evidence outweighs its prejudicial impact.

The prosecution continued to utilize substantial hearsay. This error was compounded when the prosecution was permitted and actually assisted by the court in establishing that, one day prior tot he arrest of robert Figueroa, various DEA reports were titled "Robert Figueroa" investigation. This impropriety occurred in the following manner. During cross-examination of Agent Nargi, counsel for appellant established that after reviewing the debriefing reports of Texeira, no statements or actions of any type were attributed to appellant Robert Rigueroa by Teixeira. The agent attempted to interject a non-responsive answer that the file title of the case is "Figueroa". (652) Counsel for appellant then moved away from the area of his inquiry.

The prosecution, not content with the improper answer given by its witness, returned to this area of inquiry on redirect in attempt to drive home the point that one day prior to his arrest the DEA had decided to entitle this case the "Figueroa" case. (654-656) The court rather than provent introduction of what is only the agent's conclusion, assisted the prosecution:

Q. Now I'm showing you Nargi 3501. What's the date on which that report was prepared?
A. November 7th.
Q. And that's the day before the arrest, right?
A. That's correct.
Q. And do each of these reports bear a heading?
MR. SCHULMAN: Objection with the file titles.
THE COURT: At the time that you prepared the report did you put the heading on?
THE WITNESS: Yes.
THE COURT: Was the heading prepared before the arrests were effectuated?
THE WITNESS: I—
MR. SCHULMAN: Objection, your Honor.
THE COURT: Your objecting to my question?

MR. SCHULMAN: Yes, your Honor, I am.
THE COURT: Objection overruled. Was the heading prepared prior to anybody being arrested on the night of November 8th? Do you understand my question.
THE WITNESS: Yes, I do.
THE COURT: Take Nargi 3501 first. The one on top. Was the heading on that—
THE WITNESS: There would be an easier way.
THE COURT: Do it my way. Just do me a favor. Was the heading on Nargi 3501 prepared before the arrests were effected on the night of November the 8th?
THE WITNESS: Again, as far as I can remember, yes.
THE COURT: What's your question?
(655-656)

In effect, the trial court allowed the government to counter counsel's specific questions regarding the lack of any statement or action by petitioner Robert Figueroa, as recorded in vaious surveillance and debriefing reports, with the agent's opinion that thecase should be considered the "Figueroa" case. Not only is the agents opinion irrelevant it unfortunately raised in the jurors minds the inference tha the agents have evidence of knowledge of guilt that is not before the jury.

Moreover, the prosecution was permitted to hammer home the use of both instances of this hearsay in rebuttal summation. The prosecutor reading from the transcript argued as follows:

" 'A. The title of the report is Figueroa. The title of the case.'
What does that tell you? Tat tells you that on November 7th , before anybody knew there was going to be a deal the next day, before anybody had been arrested, before any drugs were recovered *this was the Figueroa case.*

And that's obviously because just like Mr. Teixeira told you, he reported to the agents—

THE COURT: Yes Mr. Schulman?

MR. SCHULMAN: That's an objection also, your Honor.

THE COURT: Objection overruled.

MR. KLOTZ: One other instance of this that I'm go-

ing to give you. This is now talking about a later, a report of later meeting. And this report was prepared after the arrests were made.

Mr. Schulman asked the witness Agent Nargi, isn't it true that in this report you say that Mr. Teixera told you that Mr. Ventura had done dreug deals involving hundreds of thousands of dollars, isn't that true? That specific question, just answer that question, no other question.

And I asked a question on redirect examination, I asked the question, referring Mr. Nargi to that question where he said yes, Mr. Ventura said he previously had done drug deals involving hundreds of thousands of dollars, I asked:

"Q. Did Mr. Teixeira report to you with whom Mr. Ventura said he did the deals?"

Objection from Mr. Schulman. And then we had a conference at the side for about ten minutes and then the objection was overruled and the witness answered:

"A. *Yes.*

"Q. *Who?*

"A. *Mr. Teixeira told me it was Cessi's connection.*" (1198-1199) (emphasis added)

This court has previously ruled that hearsay although it may be cleverly disguised is nevertheless inadmissible. See *United States v. Figueroa,* 750 F.2d 232 (2d Cir. 1984) *United States v. Check* 582 F.2d 668 (2d Cir. 1978) and cases cited therein.

As the court noted in *Figueroa, supra*

"The government's primary witness in *Check* was an undercover detective, Spinelli. In his investigation of *Check* a fellow police officer suspected of narcotics trafficking, Spinelli worked closely with Cali, a confidential informant who refused to testify at tria. Through some artful questioning, the prosecution sought to introduce the content of the Cali-Spinelli conversations without engendering hearsay problems. Thus the prosecutor repeatedly inquired: " 'Without telling uswhat Mr. Cali said to you, what did you say to him?' " *Check,* 582 F. 2d at 671 (quoting *Check* trial transcript). Spinelli's responses—his alleged statements to Cali—wholly incor-

porated information which Cali obviously had conveyed to him. *Id* at 675

* * *

The whole point of our decision in *Check* See 582 f.2d 679, was to stop prosecutors from circumventing the hearsay Rule by the kind of atomization here sought to be defended."

Most importantly, the declarant was the first ot testify, and the subsequent introduction of hearsay served no purpose other than to prejudice the petitioner.

Clearly, the information sought to be elicited had no relevance other than to tell the jury that agents had information, or worse yet, an opinion that petitioner, Figueroa was guilty. The admissionof this testimony certainly was prejudicial and must clearly have influenced the jury. The admission or this testimony requires reversal.

III.

A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THE QUESTION OF WHETHER THE PROSECUTOR'S USE OF PETITIONER'S POST-ARREST SILENCE HAD VIOLATED DUE PROCESS

The provision of *Miranda* warnings to a defendant implies an assurance that the defendant's silence will carry absolutely no penalty by ingerence or otherwise. *Doyle v. Ohio,* 426 U.S. 610, 618-9. (1976) The prosecutor elicited testimony from a federal agent, over counsel's objection, which indirectly indicated that petitioner Robert Figueroa had refused to make a post arrest statement. (514-16) This evidence, when placed before the jury, warranted reversal.

The United States Court of Appeals for the Second Circuit ruled that the prosecutor had not make "improper usage" of Mr. Figueroa's post arrest silence, neither in questioning of the agent nor in any other context. It is asserted that the questioning had indirectly indicated to the jury that Robert Figueroa had refused to make a statement after his arrest and that this refusal was of some comsequence to the jury as trier of fact.

During the trial the prosecutor elicited the following testimony:

Q. Did you participate in the processing of any of the defendants after the arrests?
A. Yes, I did.
Q. What was your role in the post-arrest processing of the defendants?
A. *Mainly to interview anyone that wanted to give a statement.*
Q. And how many people did you talk to?

Mr. Schulman: Objection, your Honor.

Mr. Klotz: Withdrawn.

Q. *Did you interview any of the defendants present in the courtroom today?*

Mr. Schlman: I'll make a further objection afterwards, it your Honor understands what I'm referring to.

The Court: Talking about the interviewings now? He withdrew the question.

Mr. Schulman: There is an objection to something earlier said.

The Court: I honestly don't follow. There was a question, you objected, he withdrew the question. I don't think there's anything pending.

Mr. Schulman: Right before that, your Honor.

The Court: Before that on the subject of 107 and 108?

Mr. Klotz: I've gone on to something else. I'm going into post-arrest interviews.

The Court: All right. When you get to a point where you're going to object object and I'll hear you out later.
Q. Mr. Nargi, did you interview any of the defendants present in the courtroom today?
A. Yes, I did.
Q. Who did you interview?
A. I interviewed three of the defendants here. (514-515) (emphasis added)

* * *

Counsel for Robert Ffigueroa moved for a mistrial.

Mr. Schulman: The reason I objected earlier was the witness in response to a question by Mr. Klotz said "Anyone who cared to make a statement." I can't

remember the exact question but he responded " We were taking statements from anyone who cared to make a statement."

Your Honor, this was clearly to me a comment on the fact that my client, and I guess some of the others, did not make, did not volunteer a statement, did not make a statement. I think it's extremely damaging and I'm loath to move for a mistrial at this point but that's what I'm going to do." (522)

Specifically, counsel noted the agent's testimony that his participation in the processing of the individuals arrested on November 8, 1988 consisted of interviewing "anyone that wanted to give a statement." This answer was clearly a comment on the fact that Robert Figueroa did not volunteer a statement to the agent. This was extremely damaging to Mr. Figueroa. Defense counsel moved for a mistrial noting that the trial court's instruction (518) had further highlighted the improper testimony with regart to post-arrest, post *Miranda* statements. (522-3) The trial court denied counsel's motion for a mistrial. (523)

Upon being subjected to interrogation in police custody, a suspect must be informed of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), which of course includes the right to remain silent. *Mirenda* teaches that the prosecution *Imay not use at trial "the fact that [the defendant] stook mute or claimed his privilege in the face of accusation." Id* at 468, n. 37. *United States v. Shue,* 766 F.2d 1122, 1127 (7th Cir. 1985). Silence carries no penalty. This is implicit in the *Miranda* warnings. Therefore, due to the warnings, "every post-arrest silence is insolubly ambiguous" *Doyle, supra,* at 617.

The government implied that Robert Figueroa's silence upon arrest, under the circumstances of November 8, 1988, was of some consequence to the trier of fact. See, *United States v. Hale,* 422 U.S. 171, 180 (1975).

The exploitation of appellant's silence, whether by direct reference or indirectly through the testimony regarding the processing of the defendant, violated due process and amounts to plain error. The impact on defendant's right to due process is

the same. Reversal is necessary under the circumstances to avoid a serious miscarriage of justice. *United States v. Frady, 456 U.S. 152, 163 (1982).*

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: Brooklyn, New York
August 3, 1990

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of May, one thousand nine hundred and ninety.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE DANIEL M. FRIEDMAN,*
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERTO FIGUEROA, RIGOBERTO RAMOS, HECTOR RIVERA,
Defendants-Appellants.

Nos. 89-1468, 89-1469, 89-1494
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
MAY 7 1990
ELAINE B. GOLDSMITH, CLERK

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel for appellee and defendant-appellant Figueroa, and submitted by defendants-appellants Ramos and Rivera.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said district court be and they hereby are AFFIRMED.

1. Defendants-appellants Figueroa, Ramos, and Rivera appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York, John F. Keenan, *Judge*. Figueroa, Ramos, and Rivera, together with others not parties to this appeal, were convicted of (1) conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. §846 (1988); and (2) possession with intent to distribute of two kilograms of heroin in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) (1988). Figueroa and Rivera and a codefendant who does not appeal were also convicted of possession with intent to distribute of four kilograms of cocaine in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(B)(1988).

2. Figueroa contends that a jury instruction relating to the summation by his counsel was erroneous, thus depriving him of a fair trial. We disagree. Figueroa's counsel told the jury in summation to "[a]sk the prosecutor if he thinks [cooperating codefendant] Ventura lied." It would have been plainly improper for the prosecutor to respond to that challenge by indicating his opinion as to Ventura's truthfulness. *See United States v. Modica*, 663 F.2d 1173, 1179 (2d Cir. 1981) ("This Court has repeatedly warned prosecutors not to vouch for their witnesses' truthfulness"), *cert. denied*, 456 U.S. 989 (1982). Thus, it was perfectly appropriate for the district court to instruct the jury that "it is improper for any lawyer during their summation to give his opinion or belief or to tell you what he thinks as to whether the witness is lying." This instruction did not criticize defense counsel, nor did it prevent the jury from fully considering Figueroa's arguments as to asserted inconsistencies or credibiblity gaps in the government's case.

3. We reject Figueroa's further contentions as meritless. Even if we agreed with Figueroa that the prosecutor's rebuttal summation contained improper remarks, and we do not, er would find no reasonable likelihood of prejudice warranting reversal. *See United States v. Tutino*, 883 F.2d 1125, 1136-37 (2nd Cir. 1989), *cert denied*, 110 S.Ct. 1139 (1990). There is no indication that the prosecutor made improper usage of Figueroa's post-arrest silence either in the questioning of agent Nargi or in any other context; indeed, Figueroa directs us to no

indication that the prosecutor ever so much as referred to Figueroa's constitutionally protected silence. It was proper for the government to elicit testimony that the case file was titled "Figueroa" prior to Figueroa's arrest on November 8, 1988, since the government was endeavoring to respond to the suggestion that Teizeira, the informant, had never identified Figueroa to law enforcement personnel before that date. *See United States v. Pierre*, 781 F.2d 329, 334 (2d Cir. 1986). Similar considerations apply to the admission of Nargi's testimony concerning the full content of statements made to him by Ventura, Finally, Texeira's testimony concerning Ventura s statements was neither inadmissible hearsay, *see* Fed.R.Evid. 801 (d)(2)(E), nor improper evidence of prior similar crimes, *see United States v. Mangano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

4. Ramos contends that the district court erred when, after conducting a suppression hearing, it admitted Ramos' post-arrest statements into evidence at trial. In order to prevail on this issue, Ramos has the burden of showing that the district court's findings of fact were "clearly erroneous." *United States v. Mast*, 735 F.2d 745, 749 (2d Cir. 1984). Ramos fails to carry this burden. The district court evaluated the credibility of the testimony offered at the suppression hearing by Ramos and by the government and, in a written opinion and order, carefully explained the conflict and stated the court's reasons for resolving it in the government's favor. We see no basis for reversal.

5. Ramos's other contentions are unavailing. The evidence against him was clearly sufficient to warrant guilty verdicts on all charges submitted to the jury. The narcotics found on his person were properly admitted as direct proof of Ramos's knowing participation in the charged crimes. Finally, the district court's decision to admit the expert testimony of agent Tully was within the bounds of its discretion, since this testimony explained the usage of samples in the drug trade. *See United States v. Diaz*, 878 F.2d 608, 616-18 (2d Cir.), *cert. denied*, 110 S.Ct. 543 (1989).

6. Rivera's contention that the district court erred in admitting into evidence an appointment card bearing Rivera's name

and a list of dates and times on the front side, and the notation "Wednesday 2 kilos, Friday 1½ kilos" on the reverse side, is totally without merit. The card was clearly relevant, and the parties had ample opportunity to present to the jury their respective views of its significance.

7. We see no error in the district court's decision, in sentencing, to enhance Rivera's sentence by four base offense level points. The district court was entitled to conclude that the requirements of section 3B1.1 of the Sentencing Guidelines were met, thus mandating the enhancement, because Rivera was an organizer and leader of the drug business conducted at the filling station, and five or more participants were involved therein.

N.B.: This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in related cases before this or any other court.

s/ J. Edward Lumbard
J. EDWARD LUMBARD

s/ Daniel M. Friedman
DANIEL M. FRIEDMAN

s/ J. Daniel Mahoney
J. DANIEL MAHONEY

APPENDIX B

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district and wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 21, UNITED STATES CODE, SECTION 846

ATTEMPT AND CONSPIRACY

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

TITLE 21. UNITED STATES CODE, SECTION 841

PROHIBITED ACTS

UNLAWFUL ACTS

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.